IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 310

IN THE MATTER OF
GRANADA APARTMENTS, INC.,
Debtor.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AND OTHERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AN OPINION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT UPON APPEAL 7061 FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO RECONSIDER PETITION FOR CERTIORARI, TO REVERSE AND REMAND UPON AUTHORITY OF OPINION NOS. 281-282 FILED FEBRUARY 3, 1941.

WEIGHTSTILL WOODS,
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JAMES GLENN MCCONAUGHY,
On the Brief.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MOTION TO RECONSIDER AND TO GRANT PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitions 281, 282 and 310 came up to review one decree, which was entered by the District Court on May 2, 1939. Behind these three petitions are one unit set of pleadings, one unit hearing, and one unit record in the District Court.

During the present term of court, on November 14th last, by memorandum order, Your Honors denied the petition for certiorari which had been filed by this petitioner, as No. 310 in this court, to review appeal 7061, taken by him to the Circuit Court of Appeals for the Seventh Circuit.

Since then, namely, on February 3rd last, Your Honors delivered an opinion in re petitions 281 and 282, and

reversed two decrees[1] of the Circuit Court of Appeals for the Seventh Circuit, which had been entered on appeals 6986 and 7060 taken by respondents to that court. On March 10th Your Honors denied a petition by respondents for rehearing.

The opinion by the Circuit Court of Appeals which you thus reversed, also dealt with a third matter, namely, said appeal 7061 by petitioner, which was not before Your Honors in cases 281 and 282.[2] This matter of petition 310, which was before the Circuit Court of Appeals as appeal 7061, and ruled upon by the same opinion of that court, had to do with the answer, objections and counterclaim filed by this petitioner in the District Court against the same parties who are respondents in this court in cases 281 and 282. The record in cases 310, 281 and 282 being the same,[3] and Your Honors having ordered a reversal in cases 281 and 282, this petitioner respectfully makes motion: (1) that Your Honors will vacate the order (entered in case 310 on November 14, 1940), which denied the petition for certiorari; (2) and in view of your opinion in cases 281 and 282, that the petition for certiorari in case 310 be reconsidered and granted, and (3) that in keeping with the opinion in cases 281 and 282, the decree by the Circuit Court of Appeals as to appeal 7061 be reversed, and (4) that the cause 310 (appeal 7061) be remanded to the District Court for such further proceedings as may be deemed appropriate.

Respectfully submitted,

WEIGHTSTILL WOODS,

Attorney for Petitioner.

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1. 111 Fed. (2d) 834; and PR. 970-971.

2. Cases 6986 and 7060 in the Circuit Court of Appeals.

3. The Circuit Court of Appeals, by consolidating appeals 6986 and 7060 (281-282 in this court), with 7061 (310 in this court), used the same record for all appeals. Respondents admit that the record is the same and have stated that: "There is no question as to the propriety of the action of the Court of Appeals." See page 5 of Respondents' Answer to Petition as filed in case No. 310.

SUGGESTIONS IN SUPPORT OF MOTION TO RECONSIDER AND TO GRANT CERTIORARI.

When, on November 14, 1940, Your Honors granted certiorari in Nos. 281-282 and denied certiorari in matter No. 310, your reason for granting or denial was not stated nor then known to this Court Trustee. On February 3, 1941, Your Honors' opinion was delivered in 281-282, which reversed the ruling by the Circuit Court of Appeals, and remanded those two appeals to the District Court for further proceedings.

From the opinion filed February 3, 1941, it now appears that Your Honors sustained the basic contentions made by the Court Trustee in this matter which was 7061 in the Circuit Court of Appeals, and is 310 in this court; namely, Your Honors ruled that there was *multiple representation of conflicting interests by all the fiduciaries,* which fact authorized the District Court to disallow fees and expenses other than such actual expense outlays as might be proven to have been incurred *exclusively* for the benefit of the Granada Estate.

Your Honors will recall that by these proceedings not only were additional fees sought by the respondents from the Granada Estate (which this Court and the District Court have disallowed), but the Court was asked to approve an accounting which showed the retention of Granada funds for fee credits and other cash credits claimed by City National Bank and Trust Company. The pleadings by City National admitting this fact are in the record. (PR. 111-126, 165-169.) Even if the Court Trustee had not filed a counterclaim, that voluntary request for the approval of the accounts submitted by City National, raised

the question whether it is indebted to the estate. Petitioner urges that City National by filing these voluntary pleadings, has invested the District Court with the duty to determine the extent to which the respondents are indebted to the estate by their management or mismanagement thereof, as shown by the items they have set forth, and as shown by the items which the District Court has found.

Your Honors' opinion re 281-282 confirms and establishes all primary fact findings as made by the District Court. To reverse those matters, and not to reverse No. 310, will becloud some administrative problems on final hearing before the District Court.

The ruling made by this Court in its opinion 281-282 filed February 3, 1941, clearly requires that the request by the respondents that they may retain the sums they claim as fees and otherwise, should be denied and that City National should be surcharged therewith, and should be required as ordered by the District Court, to return all such monies to the estate and to the Court Trustee, because respondents had acted in conflicting capacities in performing services for which City National claims a right to deduct these monies from the estate as their fees and otherwise. In this connection the following two questions are presented under the Chandler Act:

I.

DOES A FEDERAL BANKRUPTCY REORGANIZATION COURT HAVE THE AUTHORITY UNDER CHAPTER TWO, SECTION 2 (a) (21), OR OTHERWISE, IN AN ACCOUNTING MADE VOLUNTARILY BEFORE IT BY AN INDENTURE TRUSTEE IN POSSESSION PRIOR TO THE FEDERAL REORGANIZATION PROCEEDINGS, TO SURCHARGE SUCH TRUSTEE WITH THE AMOUNT OF DISBURSEMENTS CLAIMED AS FEES, AND OTHERWISE, BUT NOT SUPPORTED BY SHOWING OF EXCLUSIVE BENEFIT TO THE TRUST?

II.

DOES A FEDERAL BANKRUPTCY REORGANIZATION COURT HAVE THE DUTY UNDER CHAPTER TWO, SECTION 2 (a) (21), OR OTHERWISE, IN AN ACCOUNTING MADE VOLUNTARILY BEFORE IT BY AN INDENTURE TRUSTEE IN POSSESSION PRIOR TO THE FEDERAL REORGANIZATION PROCEEDINGS, TO SURCHARGE SUCH TRUSTEE WITH THE AMOUNT OF DISBURSEMENTS CLAIMED AS FEES, AND OTHERWISE, BUT NOT SUPPORTED BY SHOWING OF EXCLUSIVE BENEFIT TO THE TRUST?

Both of these questions may be discussed together.

The situation of the claim for disbursements by City National was described by the opinion of the Circuit Court of Appeals as follows:[4]

> "Subsequent to the approval of a plan of reorganization, submitted by the committee, City National, on September 14, 1937, filed its proof of claim in the amount of $10,899.90, alleging said indebtedness was established by decree of the Superior Court of Cook County, Illinois, entered December 18, 1936, in a certain foreclosure proceeding, in which City National was complainant and the debtor corporation, defendant. The itemized statement of the claim as fixed and allowed by the Superior Court, was as follows: Fees of City National as Trustee, $2,570; solicitor's fees for City National $8,250; and court reporter's fees, $39.90. At the time the debtor's property was turned over to the Court Trustee, the City National had in its possession the sum of $1,608.56, *which it applied to its claim, thereby reducing the same to the sum of $9,241.34, as shown by the amended claim.* August 30, 1937, City National filed a report of its stewardship as trustee, and on September 9, 1937, the Court Trustee filed objections to the report and claim as filed by City National. Thus are raised the more important issues of the case. The objections are in the nature of a *counterclaim* charging divers acts of mismanagement and *asserting that City National was entitled to no compensation either for itself or its attorneys.* Answer was filed to this counterclaim, denying specifically its numerous allegations." (Italics supplied.)

4. PR. 956-957.

Upon these pleadings the accounting was had.

After hearing the accounting the trial court ruled that City National should be surcharged for *cash* withheld from Court Trustee because:

> "3. City National without making a substantial adverse claim, refused to pay over cash funds pursuant to court order and demand made by the Court Trustee May, 1937.....$1,990.86"[5]

The aggregate of the items which the District Court found were due from City National Bank and Trust Company, are set forth in the margin.[6]

By Your Honors' opinion of February 3rd last, in cases 281-282, it appears that City National has no proper defense but has disentitled itself to the credits claimed by reason of its representation of adverse interests. This

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5. Finding 55, PR. 789.

6. "55. The evidence shows that the following items are due from City National Bank and Trust Company to Debtor Estate and the Court Trustee, together with interest at five per centum on each item from the date of its accrual and that the accounting by City National should be surcharged therewith:

2.	Restoration of incinerator (waste and neglect) August 1937	$ 500.00
3.	City National without making a substantial adverse claim, refused to pay over cash funds pursuant to Court order and demand made by the Court Trustee May 1937	1,990.86
4.	Without authority City National consented to and made wrongful payment from rentals upon receiver's certificate	7,500.00
	And also caused payments to Pick successor August 1933	13,000.00
5.	City National charged for management fees as trustee in possession; never earned, before May 1937	11,365.42
6.	Without authority City National paid court costs, fees and legal expenses never earned, February 1936	10,186.65
7.	City National paid valet commissions to Arlington, earned by Granada rental space, before April 1937	250.00
8.	City National without authority wilfully reduced and failed to collect or pay over rentals due from Arlington for inter-hotel services from January 1, 1933	19,170.00
9.	City National neglected and failed to seek tenants for ballroom, solarium, writing room and director's room, all space adjacent to lobby	10,968.00
10.	Needless tax penalties (admitted by City National petition) resulting from failure to apply funds to taxes, before May 1937	5,000.00"

ruling substantially confirms the finding by the trial court that:

> "A continuance of said representation at all times was a breach of trust which alone disentitles counsel or committee or City National to any compensation for services to Granada."

The Circuit Court of Appeals said that the matter was *res adjudicata* by reason of the state court decree. The Court of Appeals said:[7]

> "Item III, in the amount of $1,990.86, includes a number of items, the largest of which is $1,608.56. In the proceeding in the Superior Court of Cook County, referred to heretofore, an accounting was had between City National and the debtor. By the decree entered in that court December 18, 1936, the account was *adjudicated,*[8] and the City National was expressly authorized to apply said sum upon the indebtedness due it. It appears to be the position of the Court Trustee that the order of the Superior Court was void. We conclude to the contrary and, that City National properly applied this amount to its claim as authorized by that court."

Thus the *power* of the District Court to require an accounting by fiduciaries despite a prior court decree, and the turnover of all assets of the debtor was challenged and denied by the Circuit Court of Appeals. The opinion by Your Honors in 281-282 lays down a principle which rules to the contrary.

The Circuit Court of Appeals ignored the pleading by respondents which waived any question of *res adjudicata,* also ignored the ruling by Your Honors in the *Los Angeles Lumber Company case,* and also ignored the oral waiver made by counsel for respondents in that court, which oral waiver was repeated in this court upon the oral argument. The Circuit Court of Appeals also ignored the plain language of the Chandler Act.

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7. PR. 960.
8. Italics supplied.

Section 2 (a) (21) of Chapter Two of the Bankruptcy Act in part provides that the bankruptcy court may:

> (1) Require receivers and trustees not appointed under the Bankruptcy Act to turn over all property of the debtor to the Court Trustee;
>
> (2) Require an accounting by such former trustee and re-examine the propriety of all disbursements made out of such property and unless such disbursements have been approved by a court of competent jurisdiction *upon notice to creditors and other parties in interest,* may surcharge such trustee with the amount of any improper disbursement.[9]

The opinion by the Circuit Court of Appeals does not suggest that any "notice to creditors and other parties in interest" was ever given by City National in the Superior Court proceedings. Likewise the record of the proceedings in the District Court does not suggest such notice. Respondents never testified upon or offered to prove [the court trustee demanded that proof (PR. 100)] this primary fact. In the absence of even an assertion that the Superior Court proceedings were solemnized by notice to creditors and others, the Circuit Court of Appeals ruled that the District Court, despite Chapter II, Section 2 (a) (21) of the Bankruptcy Act, had no jurisdiction of the accounting, and that such accounting was *res adjudicata.* Petitioner submits that:

> (1) *The power, jurisdiction and duty of a bankruptcy Court* to demand an accounting from former fiduciaries of the debtor presents a question of very great and real importance if the efficient administration of debtor's estates under the Federal Bankruptcy law is to be effected, and
>
> (2) That the present interpretation of Section 2 (a) (21) of Chapter II, of the Bankruptcy Act by the Circuit Court of Appeals for the Seventh Circuit is erroneous and will result in the failure of bankruptcy courts to assert their *statutory and inherent powers*

9. The complete text of this subsection of the Bankruptcy Act is set forth at Appendix "A".

and duties of jurisdiction with the result that efficient administration and collection of debtors' property will be greatly jeopardized.

Thus not only is the authority and power of the District Bankruptcy Court at issue but also its duty has been denied, by the ruling made by the Circuit Court of Appeals, which Your Honors are asked now to reverse.

To grant this motion will enable the fact findings by the District Court to be carried out, and will forward the purposes of the remand ordered re 281 and 282 by the opinion of this court filed February 3, 1941.

In the Circuit Court of Appeals Nos. 6986, 7060 and 7061 were heard together (PR. 963), there was one opinion, and one petition for rehearing (PR. 973-990).

Unless this present motion is granted by your Honors, opposing counsel may argue hereafter in the District Court, that your opinion in Nos. 281-282 should be applied with some limitations, because of preceding No. 310.

Reversal and remand of No. 310 is a technical requirement, for full execution of your opinion re 281-282, when the order of remand comes on for further administration in the District Court. Your Court Trustee asks the removal of this procedural cloud so that he may complete his duties in the District Court.

For these important reasons this petitioner suggests that Your Honors reconsider the petition for certiorari as heretofore filed in case 310, and upon such reconsideration grant its prayer.[10]

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10. For the purpose of properly correlating case 310 with cases 281-282, all record references herein refer to the printed record in cases 281-282.

The practice by this court of allowing certiorari and reversing and remanding upon authority of an opinion filed in a related case heard on certiorari, has been used at this term of court as is illustrated by the *Prudence Securities Advisory group of cases* that were so disposed of on January 13, 1941. (Cases Nos. 210, 211, 214, 259, 273 and 284 decided on the basis of case No. 69.)